No. 15,602

IN THE

United States Court of Appeals

For the Ninth Circuit

William Evans and Josephine Evans, *Appellants,*	
vs.	
United States of America, *Appellee.*	

On Appeal from the United States District Court for the Northern District of California, Southern Division.

APPELLANTS' CLOSING BRIEF.

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On Appeal from the United States District Court for the Northern District of California, Southern Division.

APPELLANTS' CLOSING BRIEF.

This is a reply by the appellants to the brief of the United States of America, as appellee. Counsel for appellants have very carefully studied the thirty pages of this brief and has very thoroughly examined all of the cases and authorities therein cited. The points will be discussed in the order of their presentation—which order is the same as originally outlined in appellants' opening brief.

JURISDICTION (B.A., pp. 1-3)

Appellants believe this statement to be correct.

STATEMENT OF THE CASE (B.A., pp. 3-11)

At the outset, appellants would like to emphasize the summarization of all evidence introduced in this case, set forth by them in Appendix B of their opening brief. Appellants took occasion in that brief (p. 9) to say that:

> "Appellants here summarize briefly, but very accurately, what is set forth in precise detail in the appendix to this brief, arranged witness by witness in the order called."

This statement is here repeated for the reason that the Government has found neither quarrel nor criticism with any statement contained in that Appendix B—nor with the appellants' contention and earnest belief that it is full, correct, and accurate. In fact, this is virtually admitted in the second paragraph upon page 4 of the Government's brief. Appellants here make some corrections of that portion of the statement of facts set forth by the Government at pages 4 to 11 of its brief.

It is stated (p. 4) that:

> "During the period involved herein they operated Oliver's Restaurant at 1569 Ellis Street, San Francisco, California. (R. 65, 176.)"

The court's attention is respectfully directed to the fact that neither page 65 nor page 176 nor any other page of the transcript contains confirmation of that statement. As appellants set forth in their opening brief (p. 31):

> "As a matter of fact, the record is silent as to who owned Oliver's Restaurant. The record is silent as to whether or not Josephine was employed by Evans in any capacity."

The Government says (p. 6) that the informer and participant Gilmore had had certain conversations with appellant William Evans and that:

> "He denied that these conversations were when he was buying any 'stuff' (R. 97)"

Appellants' comment here is upon the use of the word "denied". The fact is that Gilmore was a witness—*the* witness—for the Government and as such Government witness he *testified* positively (TR 97) that he had had conversations with defendant Evans but not "concerning 'stuff' ". To appellants this seems quite a different matter than terming such testimony a "denial".

Appellants would call attention to a statement—a correct one—(p. 7) that:

> "Gilmore testified he gave the $700.00 to appellant Josephine Evans for narcotics he had previously received on consignment."

Not only is this statement correct but there is no contrary evidence anywhere in the record respecting this $700.00.

The Government devotes its closing paragraph on page 8 to discussing Gilmore's testimony that he had given Josephine Evans one hundred and some odd dollars *of his own money* in part payment of the heroin delivered in the "vacant lot transaction". Ap-

pellants merely wish to emphasize at this point that *there is no other testimony in the record* respecting the payment of money to appellant Josephine Evans except that respecting the $700.00, and that respecting this some one hundred and odd dollars—and that *there is no testimony in the record respecting the giving of money by the informant, or by anyone, at any time, at any place, to appellant William Evans.*

Referring to the second paragraph on page 10 appellants respectfully submit that responses given to questions put upon *voir dire* do not constitute evidence on the case in chief and do not affect either the guilt or the innocence of a defendant. Such is the very theory of allowing statements which would otherwise constitute incompetent evidence.

One final comment upon the Statement of Facts. At the top of page 11 it is stated that appellant William Evans "denied discussing narcotics at that time" (February 27, 1957 telephone call). Appellants wish to here emphasize in connection with that denial that *neither Gilmore, the federal agent who monitored the telephone call, nor anyone else, ever testified to the contrary.*

QUESTIONS PRESENTED (B.A., p. 11)

These matters will be discussed as they are reached throughout the brief.

ARGUMENT

The argument which the Government presents at pages 12 to 30 of its reply brief will be discussed in the exact order of its presentation—with the same indicia of roman numeral, capital letter, and arabic numeral.

I.

THE EVIDENCE SUPPORTS THE VERDICT AS TO EACH COUNT (B.A., pp. 12 through 22)

A. Josephine Evans (B.A., p. 12)

The Government cites four cases in support of its contention that due to concurrent and identical sentences the appellant Josephine Evans is not concerned with the failure of proof as to the charge of conspiracy contained in Count 4. It is true that this appears to be the general rule in the Ninth Circuit but in the very Supreme Court case cited by the Government (*United States v. Trenton Potteries,* 273 U. S. 392 (1926), it is held that the rule does not apply where the verdict of guilty upon the good count:

> " . . . was in any way *induced* by the introduction of evidence upon the second" (emphasis added)

Appellants believe it will be obvious to this Court from the discussion made in appellants' opening brief —indeed, in the Government's brief, that such qualification is effective in the instant case.

B. William Evans (B.A., pp. 12-14)

Initially, appellants object to the statement upon page 13 that they have attempted to "lecture this

court". The basic elements of defense in criminal cases which appellants have set forth in their opening brief upon pages 24-25 were directed *not* to "lecturing this court" but to the furnishing of a sound and impeccable foundation for the further statement by appellants that (p. 25):

> "It would seem to appellants . . . that the honorable trial judge did not have these basic tenets in mind during the trial of the case or during the argument upon the motions for acquittal and the renewed motions for acquittal and the new trial at the close of the case."

Appellants cannot quarrel with the statement—or the cases in support thereof—that the general rule of both the Ninth Circuit and the State of California is that in determining whether or not a conviction should be sustained the court will "consider that evidence in the light most favorable to the prosecution". Appellants' point here is—as they tried to point out in their opening brief—that there is *insufficient evidence* as a matter of law. No interpretation by a trial court of *"insufficient evidence"* can sustain a conviction, nor do the cited authorities so hold.

Neither do appellants quarrel with the statements respecting the weight of the evidence or the credibility of the witnesses. Appellants welcome this opportunity to again state that there is *not* "some substantial evidence in the record indicating appellant's guilt."

1. The Conspiracy (B.A., pp. 14-19)

Appellants made—and make—no contention that the overt acts required to be pleaded and established

must of themselves "be a crime". Appellants have maintained—and do maintain—that the four overt acts alleged and proven are of such an innocuous nature that they would not support a conspiracy of any kind—much less carry with them the dignity of sustaining in the Circuit Court of the United States of America a conviction of narcotic violation carrying to a middle aged man the total penalty of 50 years in prison.

Appellants respectfully assert that the matters set forth in the last paragraph upon page 15 are wholly unresponsive to the contentions set forth by appellant William Evans that *there is an absolute and utter lack of evidence to connect him with any offense charged in any of the four counts.* The Government makes reference to "secrecy and concealment"—but here its showing is predicated upon conversations between its own witness (Gilmore) and the defendant William Evans, and the case is devoid of proof that there was any "secrecy and concealment" of anything.

Referring to the five cases cited and relied upon at page 16 of the Government's brief appellants can find no quarrel with the rules of law set forth therein—but can find such "quarrel" with the attempted application of those rules at law to the case at bar.

Appellants are willing to admit (p. 16) that:

> " . . . the act of one conspirator in the prosecution of the enterprise is taken as the act of all, and can be admitted into evidence and considered against all the conspirators."

However, the trouble lies not in the rule of law set forth and conceded, *but in the fact that no common enterprise has been proven in the case at bar*—and that there is no evidence which has been admitted in this case which can be considered against the appellant William Evans *in any respect*—unless or until a *conspiracy* has been proven; unless and until it has been shown that the two appellants here—and perhaps Gilmore—were "conspirators." *That has not been done! That does not appear herein!*

The several cases relied upon by the Government at pp. 16-17 establish no startling rule of law. They are applicable *only* when the rules therein stated are applicable to the case at bar. In this instant case no "unlawful combination, confederacy and agreement" has been even remotely established. There is here not only no evidence of "an express agreement" but no evidence—none at all, appellants again respectfully assert—of *any* agreement, conspiratorial or otherwise.

The statement (p. 16) "The clear inference from the record" is purely a comment by the writer of the Government's brief. That there is no evidence here upon which to predicate an inference is established in appellants' opening brief at pp. 49-52. Nor is defendant under arrest in the federal courts under any duty to deny accusatory statements (See Footnote No. 1, *post*)

The Government goes far afield in the last paragraph on page 17. It is not sufficient that "opportunity" exists—not sufficient that one of the appellants was "intimately familiar with traffic in narcotics"—

even that he had "been twice convicted of federal narcotic violations". And as for the claimed "established modus operandi" that appellant had "a woman out in front" there is nothing whatsoever in the record to support such contention.

As appellants attempted to set forth in their brief —with amply authority therefor, the marshalling of evidence—*all of it*—and the application of the recognized law to the facts as established—they truly believe that in their opening brief it was made so clear that the efforts by the Government in its reply brief can have no substantial result—that:

> *In order to sustain the conviction of the appellant William Evans in this case of any or all of the four counts upon which he was found guilty it will be necessary to resort to suspicion—and in our form of government convictions may not be sustained upon such a ground.*

Appellants took particular notice of the case of *Blumenthal v. United States* (332 U.S. 539, 557; 92 L. ed. 154, 168 (1947)), cited at page 18 of brief of appellee. This was not only a Ninth Circuit case but a San Francisco case. It involved a long, complicated series of facts concerning the sale of 1500 cases of whiskey to numerous persons in San Francisco and other cities of the Bay Area. Neither the facts nor the law there applicable have, in the judgment of appellants, any slightest application to the case at bar.

Finally, the Government makes a poetic allusion (p. 18) wherein it admits that "single threads of evi-

dence'' standing alone present no ''discernible picture'' but sets forth the claim that:

> '' . . . woven together throughout the record and considered as a whole they make a complete tapestry depicting the scheme.''

There is no ''tapestry''—there can be none. No tapestry could be woven from the flimsy ''single threads'' of which the Government speaks, much less one complete enough upon which to base a fifty year prison sentence.

The other two cases cited by the Government under this heading were both Ninth Circuit cases, and both originated in San Francisco. There is an elaborate quotation from *Stoppelli v. United States* (183 F 2d 391, 393 (1950) certiorari denied, 340 U.S. 864, at p. 19). However, that very quotation contains this statement:

> '' . . . that reasonable hypothesis other than guilt could be drawn from the evidence.''

Surely, after the elaborate argument presented by the appellants in their opening brief, it is not necessary to again argue in response to the *Stoppelli* case that as long as a reasonable hypothesis other than guilt of the appellant Evans could be drawn from the evidence herein, the *Stoppelli* case does not apply.

It seems so very clear to appellants that none of the evidence in this case is such that any reasonable hypothesis of the guilt of William Evans could be *drawn at all,* that appellants would not know how to frame the statement differently.

By reason of the foregoing the case of *Ferrari v. United States* (1957) 244 F2d 132, gives the Government no support or comfort—as appears to appellants.

2. The Case of Ong Way Jong, et al. vs. United States (B.A., pp. 19 to 20)

It is true that appellants did rely "heavily" on the *Ong Way Jong* case. Appellants respectfully refer to that elaborate treatment at pp. 34 to 42 of their opening brief. The Government attempts to dispose of these contentions in less than one printed page. This appears to appellants to constitute a very cavalier treatment of such an excellent and exhaustive treatment by this very Court. Appellants feel that they need scarcely deign to comment upon such meager reply to their detailed and earnest and accurate exposition of the application of the *Ong Way Jong* case in no less than eight pages of their opening brief.

However, the Government does refer to the very recent case of *Parente v. United States* No. 15,361, decided November 12, 1957, and not yet in advance sheet form. This case is, of course, more familiar to this Court than it is to the appellants or to the Government. However, we have studied that opinion carefully. There the court said (p. 2):

> "The evidence above recited unquestionably portrays a conspiracy on the part of appellant and White to sell narcotics."

In that case the activities of the appellant there and of one White and of a third defendant extended to

Las Vegas—San Francisco—San Jose. We will not take the space to detail the facts but quote the following matters from p. 2 of the printed opinion (Pernau-Walsh copy). It is there stated that the appellant said to the government informer (p. 2):

> "I'll take you across the street and meet the fellow that has the stuff."

This happened in San Jose, and after the introduction took place the defendant left, saying (p. 2):

> "I will leave you two fellows with your business."

The opinion further states (p. 2):

> " . . . here appellant is shown to be a contact man bringing buyer and seller together."

There was no "tale of three cities" or any "contact man bringing buyer and seller together." in the instant case.

The slight reference to the *Parente* case is surely enough to show that the Government is unable to rely upon it in the instant case. It in no wise impairs the application of the rule in the *Ong Way Jong* case to the situation here presented to this Honorable Court.

There is no logical inference, or any inference, supported by the facts in the instant case, that appellant William Evans was "the contact man". As to the comment by the Government respecting the trial court's attitude upon the *Ong* case appellants will content themselves by relying strictly upon the record—that record is all set forth in footnote No. 7, at page 42 of appellants' opening brief.

3. Entrapment (B.A., pp. 20-21)

To three pages of appellants' opening brief, carefully documented, the Government interposes only the technical contention that the point had not been raised below. The further comment by the Government is not at all germane. Appellants' argument is directed to the *telephone call*—to the nature and character of that call—and to the harmful result therefrom, as reflected in the "inferences" seized upon by the trial judge and made the basis for the judgment of conviction (treated more at length elsewhere in this brief.)

4. The Substantive Counts (B.A., pp. 21-22)

This treatment by the Government is apparently directed to that portion of appellants' opening brief commencing with the sub-topic "Agency" on p. 45—following to the sub-topic "Aiding and Abetting" on p. 48 and the topic "The Inferences Expressly Accepted and Relied Upon by The Trial Judge" (p. 49). This entire treatment by appellants covers exactly seven printed pages. In its one page reply the Government makes an error of commission and an error of omission.

The error of commission is in treating appellants' argument respecting agency and aiding and abetting by pointing out that the appellants were tried as principals—quoting a code section—and quoting cases to the effect that one who procures another to commit an illegal act is equally guilty. This misses the point entirely, which was intended to direct attention to the fact that *of his own volition,* the trial judge brought up the subject of "agency" and took up—when sug-

gested by the Government—the subject of "aiding and abetting", also. These matters were discussed so fully in appellants' opening brief that there really seems no point to lengthening this reply brief by again discussing them. Appellants might point out, with respect to *United States v. Pinna* (1956, C.A. 7) 229 F2d 216, that the case is cited by the Government in support of the proposition that lack of direct proof of receipt, concealment, etc., "is not fatal." However, there is added to this statement the following (p. 22):

> " . . . when the circumstances in proof lead to the *unescapable conclusion* that the defendant was instrumental in the dealings."

This qualification set forth by the Government, itself precludes the application of the rule of the *Pinna* case to the case at bar. By way of comment upon what appellants believe will prove to be a very effective treatment of the matter of the inferences drawn by the trial court, the Government contents itself with this strange language (p. 88):

> "The court was entitled to draw an inference from the facts that appellant William Evans had arranged to be screened by appellant Josephine Evans, and to find him guilty as a principal."

This is just a statement—a gratuitous statement—for there is no evidence in the record to support it. Nor, indeed, does the Government point out the slightest evidence which would support it—notwithstanding that if such evidence did exist it would be a comparatively simple matter to set it out, due to the exhaustive and complete manner in which appellants have

set forth the resumé of all of the testimony in Exhibit B., attached to their opening brief.

II.

THERE WAS NO ERROR OF ADMISSION OF EVIDENCE AGAINST BOTH APPELLANTS. (B.A., pp. 23-25)

1. Here, the Government takes a position which is extremely technical. Appellants submit that by their statement (TR 46; A.O.B. p. 53) that the interrogation complained of could not be permitted "on the theory of conspiracy because there has been no conspiracy established" they made the reason and the point sufficiently clear. The court understood it, and only allowed the Government to go forward upon the assurance by counsel that the conspiracy would "be connected". Appellants respectfully submit that it was *never* connected—that therefore the conditional admission of the testimony by the trial court—with this limitation or "string" attached—was sufficient for the purposes of the point here made. Appellant has no quarrel with the cases cited with respect to the order of proof, either as to the general proof of the case, or as to the proof of corpus delicti—but do insist that the subsequent testimony did *not* establish any facts connecting the appellant William Evans with any conspiracy to violate the law.

The Government also takes occasion here (p. 24, and again in its footnote 4 on p. 25) to chide appellants for alleged failure to "comply with Rule 18 (2) (d)." It is respectfully submitted that appellants have been

meticulous in this regard and the mere cursory examination of their opening brief will so disclose.

2. The matter here presented with respect to the identity of the person who answered the monitored telephone call may have been determined adversely to appellants by the holding in the Ninth Circuit in the recent case of *Lii v. United States* (Hawaii—1952) 198 F2d 109. This contention will be submitted.

3. This half-page constitutes no answer at all to appellants' argument, which please see (A.O.B., pp. 55-56).

4. Appellants deem their presentation of this point sufficiently important to merit a reply, but the Government has not seen fit to comment upon it.

III.

THE MOTION FOR JUDGMENT OF ACQUITTAL WAS PROPERLY DENIED AT THE CLOSE OF THE GOVERNMENT'S CASE (A.B., p. 26)

This half-page reply to appellants' serious contentions presented under Point III of their opening brief at pages 57-61 constitutes no answer at all. Appellants have carefully examined the three cases relied upon by the Government as well as Rule 29 of the Federal Rules of Criminal Procedure and cases cited thereunder. They have been unable to find any support whatsoever for the Government's contention.

There must, of course, be cases where the trial court denies a motion for acquittal under Rule 29—and de-

nies it properly. This is not one of them. While appellants felt—and feel—that their first motion made at the conclusion of the Government's case *should* have been granted—it is none the less true that the second one—at the close of the evidence—*must* have been granted; hence the trial court was in error which can be corrected only by reversal.

Appellants contended at the trial—contended in their opening brief—and here contend—and have discussed such contention elsewhere in this very brief—that *as a matter of law* the evidence was insufficient to "warrant submission of the case to the jury" (the court below being both court and jury).

Not one of the three cases relied upon by the Government sustain its position. *Elwert v. United States* (1956; 9th Cir.; Oregon), 231 F2d 928, was an income tax fraud case in which the Government's case was based on circumstantial evidence. The opinion (p. 933) is directed *only* to cases based upon circumstantial evidence.

Brandon v. United States (1951—9th Cir.—Alaska), 190 F2d 175, was a forgery case. Appellant there contended that the evidence was circumstantial (p. 177) and that his motion for acquittal should have been granted. There is no similarity to the case at bar. The statement (p. 177) that the evidence—there outlined—warranted an inference of intent to defraud does not apply to the facts of the instant case.

The remaining case, *Gendelman v. United States* (1951—9th Cir.—So. Cal.), 191 F2d 993, was an income

tax fraud case. It was therein stated (p. 995) that in determining whether the trial court had correctly ruled on a motion for acquittal it would "consider the evidence most favorable to the verdict and such reasonable inferences as the jury may have drawn therefrom." With this legal principle appellants could hardly disagree, but respondent Government has wholly failed to point out wherein that principle is applicable to the case at bar.

The motion should have been granted.

IV.

THE EVIDENCE ESTABLISHED APPELLANT WILLIAM EVANS' POSSESSION OF MARIHUANA (A.B., pp. 26-29)

The first page and a half of the Government's brief was devoted to re-marshalling the facts affecting count 4. The statement seems accurate and appellants do not challenge it—except that the characterization by one of the federal agents that appellant Evans' response to certain questions were "fencing" can only be regarded as a facetious term—having no substance or evidentiary weight. As to the statement that he neither denied nor affirmed possession of the marihuana we again direct attention to the fact that, being under arrest, he was under no duty to deny such possession.[1]

The argument by the Government at (pp. 27-28) that the statements by appellant Evans:

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[1]*Ong Way et al. vs. United States* (1957) 245 F2d 392.

> " . . . are not the responses of an innocent bystander, but considered in their context suffice to support an inference of reluctant admission of ownership of contraband."

constitute only an observation by counsel for the Government. This was a matter for interpretation by the trial court, and, in turn, interpretation by this Court. Appellant Evans respectfully contends that the trial court was not justified in so regarding these responses, and that this Court should so hold.

Next we have under this heading a fragmentary discussion of "possession". Here are cited seven cases —all of which have been examined carefully and will be here discussed briefly. *United States v. Maghinang* (1953—U.S. D.C.—Del.) 111 F. Supp. 760, is relied upon by these appellants at p. 64 of their opening brief. Likewise is the case of *Guevara v. United States* (1957—C.A. 5) 242 F2d 745, relied upon at pp. 66 to 67 of their opening brief. In both of these cases narcotics had been found in the front driving compartment of an automobile where two persons were occupying that compartment. The evidence was held to be *insufficient* to establish possession in either one.

In citing *Francis v. United States* (1956—C.A. 10) 239 F2d 560, another automobile case, and a case in which the defendant (p. 561) expressly admitted the possession of marihuana seeds and of smoking equipment—the court said (p. 561):

> "A stronger case for possession is difficult to conceive."

Appellants would make the comment that little progress has been made by the Government in the citing of these three cases.

Nor is the paragraph from *Pitta v. United States* (1947—C.A. 9) 164 F2d 601, quoted at p. 28 helpful to the Government. The statements contained in that paragraph are *predicated* upon this language: "Possession of any sort". However, in the instant case there was before the trial court *no possession of any sort.* In the *Pitta* case the court says (p. 602) that the appellant was seen to take hold of a paper of heroin and to have sniffed it. No wonder that the court says (p. 602):

> "Appellant was shown, certainly, to have had possession of the narcotic for an illegal purpose, namely, for use."

Reliance is also placed by the Government upon the recent case of *Ferrari v. United States* (1948—C.A. 9) 169 F2d 353, which arose in San Francisco. The facts are not stated in the opinion, but the case at bar does not—at all—fall within its scope.

Again (p. 29) the Government states that appellant did not deny ownership of the marihuana discovered under the carpet riser. So, again, must appellants refer to the *Ong* case, *ante,* that appellant was under no duty to deny such possession. The conlusion by the Government that (p. 29):

> "If the marihuana was not Mildred Moore's it must of necessity have been possessed by William Evans"

is wholly incorrect. There was no burden upon appellant William Evans to prove that someone beside himself and Mildred might have possessed this marihuana. Actually, the burden was upon the Government to establish for the benefit of the trial court that the marihuana was in the possession of this appellant. Such possession was never established—as is clearly shown by the evidence set forth in appellants' opening brief, and by his arguments therein and herein. Nor was there any "unexplained possession of marihuana" in the instant case. Lacking showing of possession in appellant William Evans—there was no "possession" for him to explain. By the same token, the presumptions set forth by sec. 4742 of Title 26 of United States Code—quoted therein by the Government at page 28—could not have been applicable.

The Government finally relies upon two more cases, viz, *United States v. Pisana* (1951—C.A. 7) 193 F2d 355, and the case of *United States v. Pinna* (1956—C.A. 7) 229 F.2d 216. Appellants have examined these cases—in the first place, there is no resemblance whatsoever in the facts involved in either of them to those of the case at bar—and in the second place, appellants have no quarrel with the rule of law that possession might be proven by circumstantial evidence under proper conditions—rather than direct or "word of mouth" evidence. However, appellant William Evans here reiterates that *no possession* was established in him. This is elaborately argued in appellants' opening brief at pp. 62-72—and he sees no reason to lengthen this brief by repetition or further comment. He feels

that the Government has made no proper or acceptable reply to the position there taken.

As appellant said in his opening brief (p. 71):

> "Mildred Moore may have had a dozen 'boy friends'—would any one of them who may have happened to call at that particular time be found guilty of possession and sentenced to ten years imprisonment and fined $1,000.00? We think not!"

CONCLUSION.

These appellants believe earnestly and steadfastly in the correctness of the views set forth in appellants' opening brief. They believe earnestly and steadfastly that no proper or adequate explanation or defense whatsoever has been made by the Government in its "brief for the appellee" to the contentions advanced in that opening brief.

Appellants most respectfully contend that the judgment of the court below must be reversed and hereby adopt and refer to the Conclusion set forth by them at pp. 72-73 of their opening brief.

Dated, San Francisco, California,
December 30, 1957.

Arthur D. Klang,
Attorney for Appellants.